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Supreme Court, U.S.
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NO. 96-1955

In the Supreme Court of the United States

OCTOBER TERM, 1997

HOLSUM BAKERS OF PUERTO RICO, INC.,
Petitioner,

VERSUS

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Holsum Bakers of Puerto Rico, Inc. *and* Congresso de Uniones Industriales de Puerto Rico, Cases 24-CA-6859, 24-CA-7041, and 24-RC-7575

February 12, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On September 14, 1995, Administrative Law Judge Michael O. Miller issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply to the answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt the recommended Order.

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[1] In the absence of exceptions, we adopt pro forma the judge's overruling of the Union's objections to the conduct of the election.

Ismael Rodriguez-Izquierdo, Esq., for General Counsel.
Clyde H. Jacob III, Esq. (Kullman, Inman, Bee, Downing & Banta), for the Respondent-Employer.
Nicolas Delgado-Figueroa, Esq., for the Charging Party-Petitioner.

ORDER

The National labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Holsum Bakers of Puerto Rico, Inc., Toa Baja, Puerto Rico, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was tried in Hato Rey, Puerto Rico, on May 15-18, 1995, based on charges filed by Congresso de Uniones Industriales de Puerto Rico (the Union) on December 13, 1993 (Case 24-CA-6859), and October 3, 1994 (Case 24-CA-7041), and a consolidated complaint which ws issued by the Regional Director for Region 24 of the National Labor Relations Board (the Board) on November 30, 1994. The complaint allegations before me assert that Holsum Bakers of Puerto Rico, Inc. (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by disciplining and discharging Carmelo Rivera-Rodriguez, its employee, because of his union or other protected concerted activities. Respondent's timely filed answer denies the commission of any unfair labor practices.

Consolidated for hearing with the unfair labor practice allegations were certain objections to an election conducted on September 23, 1993, in Case 24-RC-7575.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS— PRELIMINARY CONCLUSIONS OF LAW

The Respondent, a Puerto Rico corporation, is engages

in the manufacture and sale, at both retail and wholesale, of bread and other bakery products at its plant in Toa Baja, Puerto Rico. In the course of that business during the past year, it purchased and received goods and materials valued in excess of $50,000 which were transported to it in interstate commerce from points and places located outside of the Commonwealth of Puerto Rico. The complaint alleges, Respondent admits, and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I further find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICES

A. *Union Activity and the Election*

Over the years, there have been at least six representation elections wherein the Union has sought to represent Respondent's production and maintenance employees. The most recent election, in Case 24-RC-7575, was conducted on September 23, 1993. The Union lost by a vote of 251 to 118, with 45 nondeterminative challenges, in a unit of approximately 450 eligible voters. Timely objections were filed; they will be considered infra.

Among those employees active on the Union's behalf was Carmelo Rivera-Rodriguez (Rivera). Rivera distributed and collected authorization cards, discussed the Union with other employees, spoke on the radio in five or six broadcasts to promote the Union's cause, and served as one of the

Union's observers at the election. Respondent stipulated to knowledge of Rivera's union activity.

The campaign gave rise to several unfair labor practice charges and allegations in additon to those at issue here. Those charges were settled informally, with Respondent admitting no unlawful conduct. However, Respondent stipulated that it bore animus toward the Union and the activities in its behalf.

B. *Rivera's Disciplinary Warnings*

On August 12, 1993, Rivera had received a "final" warning for using obscene language and defaming and denigrating the Company's supervisors. As set out in that warning, at the start of a shift, while standing by the timeclock in the presence of other employees, Rivera had stated, "These three sons of . . . (implying sons of bitches) are the ones we have to get out of here and they are dirty; Vigoreaux [vice president of manufacturing], Mena [director of human relations], Calderon . . . . Those are the ones that are stealing and have this screwed up."[1]

On October 6, 1993, when Supervisor William Sostre attempted to hand him his paycheck, Rivera told him: "Take it on to Mr. Vigoreaux." As Sostre and Jose Santiago, an employee, credibly described the incident, Sostre was only

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[1] This disciplinary action, issued before the election, was not alleged as a violation of the Act. According to Rivera, he denied the conduct when accused of it. Angel Sanitago, the supervisor who issued the warning, claimed that Rivera did not deny it but had merely asserted that he had been joking.

a few feet from Rivera when the tender was made.[2] On the following day, in the lunchroom, Rivera asked Anthony Green for his check. When told that Green did not have it, Rivera loudly and repeatedly told Green that "[y]ou're going to be worse than Vigoreaux . . . Vigoreaux . . . wants to keep my money."

Rivera did not deny the latter exchange but contended that his remarks were made in a joking, nonhostile, manner. The outburst was witnessed by two employees, Angel Nieves and Luz Cristobal. They credibly corroborated Green's description of a less-than-friendly exchange.[3]

Over the next several days, Respondent's supervisors took statements from the employees who witnessed these incidents. They also wrote out statements of their own observations.

On October 14, 1993, Rivera was issued a "final" warning for engaging in "improper, unacceptable and clearly provocative behavior aimed at disrupting institutional peace and order . . . a continuation of his" "insolence and insubordination." That warning followed, by a day, publication of a picture of Rivera, together with representatives of the Union, celebrating the conclusion of negotiations with another

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[2] Sostre described this as taking place as he went down the production line; Jose Santiago, however, recalled that it occured at the timeclock. I do not find that this discrepancy warrants that either otherwise credible witness be discredited.

[3] Nieves commented that, while Rivera had joked with him in the past, the instant comments did not appear to be jokes "because [they] began after the election" and the joking comments previously made "had nothing to do with the company."

Puerto Rico employer, Bacardi, in a newspaper of wide distribution in Puerto Rico. That picture had been noticed, and commented on, by Carmen Santiago, on October 14, 1993.[4]

On May 22, 1994,[5] Angel Santiago, cake plant superintendent, overheard Rivera speaking to a group of employees in the men's room, Rivera, he said, "made offensive and negative comments of all the plant supervisors" by saying: "that none of them was worth anything, that the only ones worth a little were Manuel Ortiz and Anthony Green." Angel Santiago placed a memorandum memorializing this observation in Rivera's personnel file. No discipline issued.

On June 8, Rivera was given a "final" warning for refusing another employee's request for assistance in an insulting and demeaning manner. Purportedly, he told her, "That is not my job . . . with six lazy women there and I have to do everything. . . . I am even going to have to do Mr. Vigoreaux's job." This conduct had occurred in May 12; it resulted in an investigation conducted by the supervisors wherein all of the alleged participants and witnesses, including Rivera, were questioned. When questioned, Rivera claimed that it was just a misunderstanding. He asserted that he had replied to the other employee's request.

> If I was the only person that worked in that area and I also asked her if Mr. Vigoreaux had also told her to

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[4] Rivera understood Carmen Santiago to be the uncle of Angel Santiago, cake plant superintendent. The record neither disputes nor corroborates his understanding.

[5] All dates hereinafter are 1994 unless otherwise specified.

> do his job . . . that all of us were paid for our work and that nobody worked for free; that we all had to do the work and that it was not fair that I alone did the work while five or six people were standing around without doing anything at that time.[6]

C. *Rivera's Discharge*

On what was probably July 20, cake department employee Teresa Perez hear Rivera say:

> [T]he products of the Company, he did not give them to any members of his family, to his wife, nor his children, nor to his grandchildren. That the products were garbage and that even the pigs did not eat them.

She described his demeanor since the election as often aggressive and indicative of him being upset. He sometimes mocked Vigoreaux when the latter came into the department by walking in a mincing, limp wristed manner behind Vigoreaux's back.

In early August, as he came through the department, Perez asked to speak with Vigoreaux.[7] Vigoreaux, who was in a hurry, asked to her wait until he had more time. He then

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[6] This incident, like the one of August 12, 1993, was not the subject of a complaint allegation. Both were introduced as background evidence, demonstrating a pattern of behavior and Respondent's practice of investigating such incidents.

[7] Perez, an otherwise credible witness, placed Rivera's remarks about June 20 and her conversation with Vigoreaux as having taken place in early July. I am convinced, from the timing of the other events, that she was mistaken and inadvertently backdated each event by 1 month, referring to June instead of July and July instead of August.

went on vacation. When he returned, about August 22, his secretary told him that Perez had spoken to her and had been referred to Mr. Mena, the vice president of industrial relations. Vigoreaux then contacted her. Perez told him that Rivera displayed a "very, very negative attitude," that Rivera did not like having Vigoreaux come into the department and that Rivera mocked and ridiculed Vigoreaux behind the latter's back when he did so. She said:

> Ever since he lost the election this person has changed. He is mad, he is angry . . . and now he's even talking bad about Company products. . . . she told me [Vigoreaux] that Carmelo has expressed to her that he doesn't eat Holsum products, that he doesn't give them to his wife . . . [or] grandchildren. That our products [are not fit for swine][8] . . . are no good.

Perez also told Vigoreaux that Rivera was apparently upset that the Union had lost the election, that no one had listened to him and was talking about the possibility of another union campaign. Perez was concerned about that, she explained, as she did not support the Union.[9] She also related that Rivera had called other employees lazy, upsetting and provoking them.

Vigoreaux, professing to be shocked at Perez' report of Rivera's comments about the products, asked Angel Santiago

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[8] The Spanish word used was "porqueria," a colloquialism translated by Vigoreaux as "filth" or "not fit for swine."

[9] When she had made a similar report to Mena, he told her: "Be at peace, because that is not going to happen here at Holsum ever." Mena went on to give her examples of companies which had gone bankrupt because of unions.

to determine whether there were any problems in that regard, particularly whether anyone was tampering with the products. He then directed Angel Santiago to question all of the employees on the donut line, ultimately expanding the interrogations to all of the employees in the department.

The employees were asked questions pursuant to a questionnaire prepared for that purpose. That questionnaire asked whether the employees were aware of the Employer's rules, whether they had mishandled the product or knew of anyone else who had done so, whether they had spoken badly of the product or knew anyone else who had done so, and whether they personally consumed Holsum products. It then asked, specifically, whether they had heard Rivera make derogatory comments about the product or say that he did not consume them or feed them to his family.

Of approximately 24 employees questioned, 6 reported that they had heard Rivera make negative statements about the products. Of these, two employees, Mayra Rivera-Cabeza and Carlos Hernandez related that Rivera had said that anyone eating the product could possibly "poison" himself or that the products "had poison." The employees signed the questionnaires. Those who had reported Rivera's negative statements were also questioned by an attorney on the Employer's behalf, with their responses recorded in signed and notarized statements.

There is no indication that any of the employees were asked about Rivera's continued promotion of the Union.

Neither did the questionnaire ask when Rivera had made adverse comments about the products. According to

Mayra Rivera-Cabeza and Carlos Hernandez, who had reported the "poison" comments, they had heard these from Rivera repeatedly in the months immediately after the election. However, they said, Rivera had ceased making such remarks by January 1994. As soon as he first heard Rivera make statements about the products, Hernandez had reported them to Angel Santiago and to Jose Sanchez, director of quality control. His testimony in this regard is uncontradicted. Apparently, Hernandez' report was ignored by management at that time.

When Rivera was questioned along with the other employees, he denied making the statements attributed to him, as he did in this hearing. Respondent chose not to believe him, noting his recent history of hostile or disrespectful conduct and the first-hand nature of the employees' reports. I similarly find that Teresa Perez, Mayra Rivera-Cabeza,[10] and Carlos Hernandez were more credible than Rivera and conclude that, at various times, Rivera made the negative remarks about Holsum's products which they attributed to him.

Vigoreaux expressed great concern because of Rivera's references to poison and "porqueria." He discussed this matter with the Employer's consultants on regulatory matters and eventually concluded that no report to the FDA was

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[10] Contrary to the General Counsel's claim on brief, Mayra (or Maria, as the record incorrectly reflects her name) Rivera-Cabeza testified in these proceedings and corroborated the information she had earlier provided to the Employer. I note that TR. 198, LL. 24-25, contains a significant error. It omits the word "poison" from the sentence, "That type of product could not even be given to pigs and that anyone who were to eat that product could possibly poison him/herself." I correct the record accordingly.

required.[11]

On September 29, Rivera was called into a meeting with Angel Santiago, Green, and Sanchez. They read him a final termination notice which referenced the employees' reports of what he had said about the products. His conduct, he was told, violated company policies against making malicious, mean-spirited, and threatening comments about its products and had been evaluated together with his history of prior unacceptable conduct. It also violated Federal law pertaining to false reports as to the wholesomeness of food products, he was told.[12]

D. *Analysis of 8(a)(3) and (1) Issues*

I am convinced that Rivera was a disgruntled employee, upset by the defeat of the Union in the most recent election and frustrated that his fellow employees saw fit to ignore his prounion importunings. He took out that frustration with expressions of contempt for the Employer, its supervisors, its products, and his fellow workers.

While the source of Rivera's contemptuous expressions apparently lay in the Union's electoral defeat, it would be stretching to call his negative comments union activity. They did not advocate support for the Union or seek improvements in wages, hours, or working conditions. Thus, they were neither union activity nor within the ambit of the "mutual

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[11] He claimed to have concerns of an incident like the infamous Tylenol poisoning case.

[12] Respondent cites the Federal Anti-Tampering Act, 18 U.S.C. § 1365, which makes criminal any knowing communication of false information that a consumer product had been tainted.

aid or protection" clause of Section 7 and were unprotected. See *Delta Health Center*, 310 NLRB 26, 43 (1993), and *Trover Clinic*, 280 NLRB 6 (1986). See also *NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953), where the Supreme Court held that a union's public attacks on the quality of an employer's product which were unconnected to the employees' working conditions or a current labor controversy were unprotected.

The *Burnup & Sims* and *Rubin Bros.* line of cases, urged as applicable by counsel for the General Counsel,[13] provides that:

> Where an employee is disciplined for having engaged in misconduct in the course of union activity, the employer's honest belief that the activity was unprotected is not a defense if, in fact, the misconduct did not occur. *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964); *Rubin Bros. Footwear, Inc.*,99 NLRB 610 (1952).

Keco Industries, 306 NLRB 15, 17 (1992). As Rivera made the negative comments but not in the course of any union or other protected activity, I find this line of cases inapplicable to the instant situation.

The foregoing conclusions, however, do not resolve the critical question of the Employer's motivation in discharg-

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[13] Counsel for the General Counsel urged reliance on this line of cases contending that Rivera did not make the statements attributed to him. I have rejected that contention. *Rubin Bros.* and *Burnup & Sims* would still be applicable if I had found that Rivera was engaged in protected activity when he uttered his statements and that those statements did not cross the line into unprotected activity.

ing Rivera. *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), provides the analytical mode for resolving discrimination cases turning upon the employer's motivation. Under that test, the General Counsel must first:

> . . . make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once accomplished, the burden shifts to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. It is also well settled, however, that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is one that the respondent desires to conceal. The motive may be inferred from the total circumstances proved. Under certain circumstances, the Board will infer animus in the absence of direct evidence. That finding may be inferred from the record as a whole. [Citations omitted.]
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> *Fluor Daniel, Inc.,* 304 NLRB 970 (1991).

A prima facie case is made out where the General Counsel establishes union activity, employer knowledge, animus, and adverse action taken against those involved or suspected of involvement which has the effect of encouraging or discouraging union activity. *Farmer Bros. Co.,* 303 NLRB 638, 649 (1991). Inferences of discriminatory motivation may be warranted under all the circumstances of a case; even without direct evidence. Evidence of suspicious timing, false reasons given in defense, and the failure to adequately investigate alleged misconduct all support such inferences.

Adco Electric, 307 NLRB 1113, 1128 (1992), enfd. 6 F.3d 1110 (5th Cir 1993); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Visador Co.*, 303 NLRB 1039, 1044 (1991); *Asociacion Hospital Del Maestro*, 291 NLRB 198, 204 (1988); *Clinton Food 4 Less*, 288 NLRB 597, 598 (1988).

In this case, Rivera's union activity in regard to the prior election was stipulated to be known to the Employer, as was its animus. More significantly, in receiving its most recent report of Rivera's negative comments, Teresa Perez put Respondent on notice that Rivera was beginning to talk about yet another campaign for union representation. All of the elements of a prima facie case are thus present.

Was Rivera discharged for his comments or because he was seen to be renewing his union advocacy at a time when another election was a real possibility? I am compelled to conclude that Respondent has failed to rebut the General Counsel's prima facie case by showing that Rivera would have been discharged for what he had said even absent the union activity.[14] Respondent was aware, since December 1993 and January 1994, 6 to 8 months earlier, that Rivera had made the harshest, most critical of his statements, i.e., that the products were "poison." Yet, when his earlier statements had been reported to the manager most directly concerned with product quality, Jose Sanchez, and to the superintendent of his department, Angel Santiago, nothing had been done. It was not until Teresa Perez reported his less critical (i.e., without reference to "poison") comments, in conjunction with her observations that Rivera was upset

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[14] That burden only requires that Respondent establish its *Wright Line* defenses by a preponderance of the evidence. *Merrilat Industries*, 307 NLRB 1301, 1303 (1992).

at the election result and was discussing the possibility of another campaign that an investigation was launched and disciplinary action taken. The delay in taking adverse action until after there is knowledge of renewed union activity evidences Respondent's unlawful motivation. See *Direct Transit*, 309 NLRB 629, 633 (1992), and *Tuskegee Area Transportation System*, 308 NLRB 251, 257 (1992) (delays of only 2 weeks involved in each case). I find that Rivera was discharged because of his renewed union activity, in violation of Section 8(a)(3), and not because of the negative statements he made regarding Respondent's products.[15]

For this same reason, I reject Respondent's contention that Rivera was validly discharged for violating its rules of conduct. I note, moreover, that there was no finding that he had violated the cited statute and that any conclusion that his rheroric amounted to a knowing communication that Respondent's products had been tainted would be strained. It is a violation of no law to say that one does not like a given line of products or feed them to his family, or to suggest that consumption of products which may be heavy in sugars or fats might be deleterious to one's health. Rivera's reference to "poison" could be interpreted to mean no more than that. See Martin Marietta Corp., 293 NLRB 719 (1989). Such an interpretation would negate any inference that his statements were malicious.

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[15] Having so concluded, I find it unnecessary to determine whether, if Rivera were to be considered as engaged in union activity when he made those statements, they were so disloyal, reckless, or maliciously untrue as to lose the Act's protections. But see *Delta Health Center*, 310 NLRB 27, 43 (1993), *Cincinnati Suburban Express*, 289 NLRB 966, 967 (1988), and *Trover Clinic*, 280 NLRB 6 (1986).

I would note further that to the extent that Respondent contends that Rivera's discharge was the result of violations of its rules pertaining to "Public Relations and Company Reputation," those rules appear to be unduly broad and violative of Section 8(a)(1). See *Cincinnati Suburban Press*, 289 NLRB 966 fn. 2, 967, and 975 (1988), and cases cited therein. As held therein, rules which prohibit "false . . . statements concerning any employee, supervisor, the Company, or its products" and "[u]nlawful, improper or unseeming conduct . . . affecting the Company's product reputation or goodwill" violate Section 8(a)(1) because they fail to clearly define the area of permissible conduct to employees and thus might cause them to refrain from protected activities. The rules relied upon by Respondent in the discharge notice and/or in its brief, similarly prohibit dissemination of "defamatory or disparaging information" about, or "making any false representation concerning . . . our products, or management." Any such rules, the Board held, must be "narrowly tailored, unambigous, and designate the category of employees to whom the rules are applicable . . . [and] not improperly impinge on the relevant rights of the affected employees' " Respondent's rules are not so limited.

Applying the same *Wright Line* analysis, I also conclude that the warning issued to Rivera in October 1993 was motivated by his union activity. I note that Respondent delayed for at least a week after the paycheck incident before issuing that warning and issued it only 1 day after his picture had appeared in the local press, showing him with union representatives celebrating the successful culmination of negotiations at another major Puerto Rican employer' Moreover, I cannot accept that Respondent's supervisors and managers were so thin-skinned as to actually deem this little

demonstration of pique, however irrational it may have seemed, as "provacative behavior aimed at disrupting institutional peace and order."

D. *The Objections*[16]

1. Objection 2—References to the DuPont Plaza fire

Several years ago, a tragic fire at the DuPont Plaza Hotel in Puerto Rico claimed 93 lives. The fire had been started by members of a different union, apparently upset at the pace of negotiations. Three members of that union pleaded guilty to setting the fire.

Shortly before the election at Holsum, the Employer posted clippings about the DuPont Plaza fire which had been culled from Puerto Rico newspapers. They bore the captions "This is the result of only one meeting to call for a strike vote."

The Employer showed a video about the fire at a preelection meeting held on September 20, 1993,[17] and Vigoreaux also spoke about the fire at one meeting. He told the employees:

> It seems there is a coincidence here of fires as a result of the collective bargaining process, between a union and an employer or at the moment in which a strike is imminent: At Gayley Rico

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[16] As I read the objections and Board's Order, my consideration of the objections is limited to the specific subjects discussed below.

[17] The record contains no details of this video.

> during the strike voted by the Congresso,[18] as well as in the case of the DuPont Plaza. Unfortunately, when a union gets into a company you cannot know what type of problems you will encounter.

Although the record does not establish when he said it, Vigoreaux also told employees that the Employer would bargain in good faith if the Union won the election. He told them, in the course of that discussion, that

> . . . the demands of the Union could be so high that the Union and the Company cannot have a meeting of the minds, and there may be a stalemate. And that as a result of stalemate, history states that some unions have called strikes. And as a result of strike. . . there may be violence. . . . Our preference would . . . that we get together and resolve things in a peaceful way.

I do not find, in the foregoing, any threat that the Employer would bargain in bad faith or reject all union demands and place the Union in a position wherein it would have to strike in order to reach agreement. *Novi American*, 309 NLRB 544, 545 (1992). Neither do I find any threat that a fire, or other violence, was the necessary result of collective bargaining. Holsum's clippings and statements accurately related the fact that fires had occurred in two negotiations in Puerto Rico, at least one of which was directly and provably caused by union members. The Employer may have suggested that unions were responsible for fires during some negotiations by it did not suggest that such a consequence

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[18] Some years earlier, the Gayley Rico plant had burned down during a work stoppage by the Congresso de Uniones Industrales de Puerto Rico. The Union denied responsibility for that fire in the hearing before me.

was always the result of collective bargaining. It certainly did not suggest that it would cause such a fire or bargain in such a way that this Union might be provoked into a violent act. In the absence of a prediction that an event similar to the DuPont Plaza fire would occur at Holsum in the event of a union victory, Vigoreaux's remarks are permissible under Section 8(c). *Blue Grass Industries,* 287 NLRB 274, 276 (1987).

Accordingly, I shall recommend that Objection 2 be overruled.

2. Objection 5—Parties

On September 22, 1993, the day before the election, the Employer held a theme lunch "festival" in the employee cafeteria. Ethnic food was served buffet style and there was music. The lunch period was not extended but the price charged, $2.70 per person, was less than the usual $3.50 to $4 charged for lunches. Such ethnic "festivals" were regular custom of Holsum; they were put on several times per year. The record does not reflect whether there was any set schedule for them. Neither does the record reveal any evidence of campaigning at this festival.

About September 20, 1993, the Employer announced that there would be a party at the plant after the votes were counted. The party was to be held without regard to who won and everyone was invited.[19] Some employees who had a

[19] The Petitioner introduced only hearsay evidence that the party was to be held only in the event the Union was defeated; Vigoreaux credibly disputed that evidence, noting that he would not excpect the loosers to come and that, had the Employer lost, it would have been a sad party.

band were hired, on an informal basis, to provide music. They set up in the cafeteria (above the production floor where the voting was conducted) between the first and second voting sessions and were observed by some employees while they did so. The party began about 45 minutes after the polls closed. It cost the Employer less than $4000, perhaps $7 per voter, and the employees who were scheduled to work on the next day were expected to do so.

As the Board stated in *B & D Plastics,* 302 NLRB 245 (1991):

> Our standard in preelection benefits cases is an objective one. . . .To determine whether granting the benefit would tend to unlawfully influence the outcome of the election, we examine a number of factors, including: (1) the size of the benefit conferred in relation to the purpose for granting it; (2) the number of employees receiving it; (3) how employees reasonably would view the purpose of the benefit; and (4) the timing of the benefit. In determining whether a grant of benefits is objectionable, the Board has drawn the inference that benefits granted during the critical period are coercive. It has, however, permitted the employer to rebut the inference by coming forward with an explanation, other than the pending election, for the timing of the grant or announcement of such benefits. [Citations omitted.]

In that case, the employer held a cookout prior to the election to which all employees were invited. That cookout was intended as a campaign function where the employer delivered its final antiunion message. Whether they

attended or not, all employees received a day off with pay. The employer justified its conduct by contending that it had no other way to end its campaign, a justification the Board rejected, noting that there were alternative means for that employer to deliver its message. The Board found the conduct objectionable, noting that a substantial benefit was conferred on the employees who would reasonably view that benefit as intended to influence their votes in favor of the employer.

In this case, a lunch "festival" was provided on the day before the election. That lunch, however, was made available to all emplyees, it was consistent with the Employer's past practice, it was not free but only offered at a discount from the usual lunchroom prices, and it was not used as a campaign vehicle. The postelection party, announced before the election and held immediately after, was more directly connected to the election. However, it was open to all employees without regard for how they voted, it was of only nominal value to each of the employees, it did not entail any paid time off, and the Employer's justification, that it was intended to rebuild morale regardless of who won the election, is both credible and reasonable. I find Holsum's conduct distinguishable from that of the employer in *B & D Plastics*, and not objectionable.

3. Objection 6—Supervisory campaigning

On the morning of September 22, according to Rivera, Vigoreaux, and another supervisor, Juan Hernandez, stood in front of the shipping office passing out "Vote No" ("VOTA NO") stickers to employees as they filed by. The stickers were about 2 inches square, orange with black lettering. The employees, he said, affixed them to their hats or blouses.

Vigoreaux and the other supervisor continued to distribute them, he said, for about 25 minutes.

Vigoreaux denied that he was passing those stickers out. He was putting up rows of them on the office windows, where employees could come by and take them. As he stood outside an office for only 5 to 10 minutes, he said, employees came up to him and asked for them. I credit Vigoreaux, noting the absence of any evidence of employees, other than Rivera, to support the contention that Vigoreaux actively passed them out rather than merely honoring employees' requests for them.

The essence of the objection to such conduct is that it may constitute subtle interrogation or polling of employee proclivities. *Kerr-McGee Chemical Corp.*, 311 NLRB 447 (1993). It is not that supervisors may not engage in campaigning to present their employer's views or preferences; clearly, they may. That campaigning, the Board has held, may include making procompany insignia available, so long as there is an "absence of supervisory involvement in the distribution process or other evidence that management pressured employees into making an observable choice or open acknowledgment concerning their campaign position." *Schwartz Mfg. Co.*, 289 NLRB 874, 879 (1988). In that case, management encouragement that employees take and wear hats with the company logo and the furnishing of such hats and "Vote No" buttons (distributed by a nonsupervisory individual) was held to be neither 8(a)(1) nor objectionable. Cited with approval in *Schwartz* was *McDonald's*, 214 NLRB 879, 881-882 (1974), where no violation was found when management personnel wore "Vote No" pins "and generally had additional pins handy to give employees."

I find that the provable conduct of Vigoreaux and Hernandez falls within the limits of *Schwartz* and *McDonald's*. Merely making the "Vote No" stickers available, or honoring employee requests for them, is not unlawful or objectionable polling or interrogation under prevailing Board precedent.

CONCLUSIONS OF LAW

1. By disciplining and discharging Carmelo Rivera-Rodriguez, an employee, because of his union activity, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

2. The Respondent engaged in no conduct warranting that the election conducted in Case 24-CA-7575 on September 23, 1993, be set aside and the Petitioner's objections to the conduct of election must be overruled.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950),

plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The Respondent, Holsum Bakers of Puerto Rico, Inc., Toa Baja, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Disciplining, discharging, or otherwise discriminating against any employee for supporting Congresso de Uniones Industriales de Puerto Rico or any other union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Carmelo Rivera-Rodriguez immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Remove any reference to the unlawful discipline and discharge of Carmelo Rivera-Rodriguez from its files and notify the employee in writing that this has been done and that the discipline and discharge will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the tems of this Order.

(d) Post at its facility in Toa Baja, Puerto Rico, copies of the attached notice marked "Appendix."[21] Copies of the notice on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent, in both English and Spanish, immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the objections to the conduct of the election in Case 24-CA-7575 be overruled.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discipline, discharge, or otherwise discriminate against any of you for supporting Congresso de Uniones Industriales de Puerto Rico or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Carmelo Rivera-Rodriguez immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and **WE WILL** make whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify him that we have removed any reference to his October 14, 1993 warning and his discharge from our files and that the warning and discharge will not be used against him in any way.

HOLSUM BAKERS OF PUERTO RICO, INC.